No. 84-1070 (9)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

LARRY WITTERS,
Petitioner,

v.

STATE OF WASHINGTON COMMISSION FOR THE BLIND,
Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS AS AMICI CURIAE SUPPORTING PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

20 pp

QUESTION PRESENTED

Whether the First Amendment permits discriminatory exclusion of an individual from neutral state programs solely on account of that individual's religious belief, status or vocation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTEREST OF THE AMICI CURIAE

The Christian Legal Society is a non-profit Illinois corporation founded in 1961 as a professional association of Christian judges, attorneys, law professors, and law students. Today it includes over 3,500 members throughout the United States. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect and promote the freedom of Christians and other persons in the exercise of their religious beliefs.

The National Association of Evangelicals, located in Wheaton, Illinois, is a non-profit association of evangelical Christian organizations, colleges, and universities, as well as some 36,000 churches from 74 denominations. It serves a constituency of 10 to 15 million people through its commissions and affiliates. Both organizations have advocated the neutral treatment of religious persons by government.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

STATEMENT

Amici curiae adopt and incorporate by reference the statement of the case appearing in the brief filed by petitioner Larry Witters.

SUMMARY OF ARGUMENT

Petitioner Larry Witters was denied government education benefits under a vocational rehabilitation program for the blind solely because of his desire to use those benefits to pursue a theological education and enter the Christian ministry. The Washington Supreme Court erred in holding that the First Amendment to the United States Constitution permits such discriminatory exclusion of religious persons from a neutral state program.

A program, like Washington's vocational rehabilitation program for the blind, "that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." *Mueller* v. *Allen*, 463 U.S. 388, 398-99 (1983). Such a program does not become more susceptible to challenge merely because one of its beneficiaries employs the benefits to pursue religious education and professional training of his own choosing, free from government coercion or influence. *See id.* at 399-401. Quite the contrary, to withhold benefits generally available to a class of citizens,

solely on account of an individual's religious beliefs or occupation, violates the First Amendment's protections of religious liberty. *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *McDaniel* v. *Paty*, 435 U.S. 618 (1978) (state constitutional provision prohibiting clergy from holding public office violative of federal Free Exercise Clause). Moreover, it is simply wrong in principle to read the Establishment Clause as requiring religious discrimination which the Free Exercise Clause prohibits. In this case, the Free Exercise and Establishment Clauses work in complete harmony to protect identical interests: religious liberty and equality.

Neither can such discriminatory treatment of religious persons by government be justified by a state's desire for an even more rigid separation of church and state than the First Amendment requires. *Widmar* v. *Vincent*, 454 U.S. 263, 275-76 (1981); *McDaniel*, 435 U.S. at 621. Even if the Washington state constitution were interpreted to prohibit neutrally administered financial aid to eligible blind persons, it could not justify religious discrimination prohibited by the federal Constitution. U.S. Const. art. VI, § 2. Therefore, no independent state law ground capable of sustaining the judgment below exists, and remand for determination of state constitutional issues is not necessary.

ARGUMENT

I. The State of Washington's Denial of Vocational Rehabilitation Benefits to Mr. Witters Solely Because of His Desire to Pursue A Religious Vocation Violates the Religious Liberty Protected By the Free Exercise and Establishment Clauses of the First Amendment.

Unlike cases where this Court has observed an apparent "tension" between the Establishment and Free Exercise Clauses of the First Amendment, in the instant case the two clauses protect interests in religious liberty that completely *converge*, not that conflict. Both clauses protect religious liberty, though in slightly different ways. The Establishment Clause protects religious freedom by prohibiting government coercion, through favoritism or hostility, in matters of religious practice or belief. *See Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971) (primary effect of enactments "must be one that *neither advances nor inhibits* religion" (emphasis added)). The Free Exercise Clause prevents government from prohibiting, penalizing or disfavoring the exercise of sincerely held religious beliefs.

The two clauses completely coincide when the claimed violation of free exercise is governmental coercion in the form of improper discrimination against persons who engage in religious exercise or pursuits. The applicable principle, firmly established by this Court's cases, is that a government policy, classification or program must have neither the purpose or effect of advancing or inhibiting the free exercise of any particular religion relative to any other religion or relative to the non-exercise of religion. Accordingly, we believe that petitioner's various claims constitute a unitary package, involving a single claim of infringement of the religious liberty protected by both clauses of the First Amendment. *See McDaniel*, 435 U.S. at 629-30 (Brennan, J., concurring in the judgment) (Tennessee clergy disqualification law "violates

both the Free Exercise and Establishment Clauses of the First Amendment . . .").[1]

A. The First Amendment prohibits denial of neutral public benefits because of an individual's religious belief, status, or vocation.

It is well established that "liberties of religion and expression may [not] be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963). That the benefit is one the State is not obliged to bestow is of no consequence. Having elected to grant financial assistance to a class of persons, as Washington has done here with the blind, the State must not adopt a reverse-religious "test" as a condition of eligibility. *See McDaniel*, 435 U.S. at 632 (Brennan, J., concurring in the judgment); *cf. Torcaso* v. *Watkins*, 367 U.S. 488 (1961). This Court has likened such conditions to the imposition of a tax or fine upon religious expression or activity. *Sherbert*, 374 U.S. at 404 (conditions upon public benefits place same kind of burden on exercise of First Amendment freedoms as a "fine" on that religious exercise); *Speiser* v. *Randall*, 357 U.S. 513

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[1] Though petitioner pressed a separate equal protection claim below, the claim is intimately related to the Religion Clauses. Indeed, many of this Court's opinions in Religion Clause cases have looked most prominently to factors of equality and neutrality. *See, e.g., Wallace* v. *Jaffree*, slip op. No. 83-812 (June 4, 1985) (legislative acts must not intend to communicate government message of endorsement or disapproval of specific religious practices); *Larson* v. *Valente*, 456 U.S. 228, 244, 246 (1982) (under clear command of Establishment Clause, laws are "suspect" and require "strict scrutiny" if they officially prefer or disfavor any religious denomination); *McDaniel* v. *Paty*, 435 U.S. at 643 (White, J., concurring in the judgment) (clergy disqualification violates equal protection clause); *Fowler* v. *Rhode Island*, 345 U.S. 67, 70 (1953) (Frankfurter, J., concurring) (prohibition of only certain worship services in public park violates equal protection). It is thus possible to think of the Establishment Clause as providing for the equal protection of the liberties bestowed by the Free Exercise Clause, which include the freedom of belief, worship, and practice as well as the freedom not to exercise any religion.

(1958) (deterrent effect of conditioning tax benefit upon loyalty oath "is the same as if the court were to fine [persons] for their speech."); *First Unitarian Church* v. *Los Angeles*, 357 U.S. 545 (1958) (same as to churches). Most recently, this Court reaffirmed the longstanding principle that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available program." *Thomas* v. *Review Board*, 450 U.S. 707, 716 (1981).

Indeed, petitioner's free exercise claim is even stronger than those urged in *Sherbert* and *Thomas*. In those cases, the religious claimant sought special exemption or dispensation from laws of general applicability. *See Thomas*, 450 U.S. at 720 (Rehnquist, J., dissenting). Here, petitioner seeks only to be treated as all others under a program of general applicability. He is not asking for special treatment because of his religious beliefs, only equal treatment regardless of his religious beliefs.

The State of Washington has put Mr. Witters to the exact choice prohibited by this Court's decisions. Mr. Witter's choice to become a Christian minister is undeniably part of the Constitution's protections of religious liberty. As this Court held in *McDaniel*, "[t]he right to the free exercise of religion unquestionably encompasses the right to preach, proselytize, and perform other similar religious functions or, in other words, to be a minister of the type McDaniel was found to be." 435 U.S. at 626. While, strictly speaking, Mr. Witters' religious beliefs may not have required that he become a minister,[2] the First Amendment unequivocably protects his choice to do so. *See McDaniel*, 450 U.S. at 626 (equating McDaniel's "religiously impelled ministry" with "cardinal principle of [his] religious faith"); *id.* at 630 (Brennan,

[2] In most Christian denominations, the ministry is thought of as a special "calling" for service. While not all members of a sect or denomination are called to enter the clergy, the decision to enter the professional ministry is scarcely one divorced from a sense of religious obligation.

J., concurring in the judgment) (no constitutionally valid distinction between "religious belief or religious action" and "career or calling" of the ministry). The Washington Supreme Court was plainly wrong in concluding that "[t]he Commission's decision may make it financially difficult, or even impossible, for appellant to become a minister, but this is beyond the scope of the free exercise clause." 102 Wash. 2d at 631, 689 P.2d at 57.

The state imposes on Mr. Witters a dilemma of life-changing magnitude: participation in an "otherwise available program" of vocational rehabilitation or training for the ministry without the financial assistance given all other blind students. The state would not impose this dilemma on him were he to pursue any other professional goal. What this Court has on other occasions called a "fine" might here be best labelled a "bribe". The state is essentially bribing Mr. Witters to pursue any other profession than that of being a clergyman. The cost of refusing this bribe is the deprivation of important financial benefits for education and vocational rehabilitation. Mr. Witters' choice of the professional ministry as a vocation was literally singled out for exclusion from the program's general availability. It is difficult to think of a clearer modern-day example of what James Madison termed "punishing a religious profession with the privation of a civil right." 5 *Writings of James Madison* 288 (6 Hunt. ed. 1904), *quoted in McDaniel* v. *Paty*, 435 U.S. at 626. The First Amendment certainly does not permit such raw discrimination.

B. The Establishment Clause does not compel discrimination against religious individuals in state provision of broadly available financial benefits, but instead prohibits religion-based discrimination.

The First Amendment's protections of religious exercise do not permit unique deprivations of general benefits due to an individual's religious activity. Most disturbingly, the court below held that the First Amendment *re-*

quires such a result. Such a holding is predicated on a seriously flawed reading of the Establishment Clause. This Court's cases emphasize the overriding principle of governmental neutrality toward individual religious activity, reflected in both the original understanding of the Amendment's framers and the proper application of the tripartite test.

1. *The dominant principle of governmental neutrality toward individual religious activity.* The Establishment Clause is not hostile to religious exercise nor to religious individuals. It is hostile to governmental favoritism toward any given religious exercise or non-exercise and to governmental discrimination against any religious adherent or nonadherent. *Cf., Lynch*, 104 S. Ct. at 1366 (O'Connor, J., concurring). Such neutrality is often best achieved by separation. However, the Establishment Clause never requires absolute separation at the expense of governmental neutrality. In a complex, modern society in which government plays an increasingly active role, a policy of uncompromising "absolute separation" ceases to be one of neutrality and becomes one of hostility. *See Lynch*, 104 S. Ct. at 1359.

In recognition of this reality, this Court has held consistently in contexts similar to the instant case that programs "that neutrally provide[] state assistance to a broad spectrum of citizens [are] not readily susceptible to challenge under the Establishment Clause." *Mueller* v. *Allen*, 463 U.S. 388, 398-99 (1983); *accord Widmar* v. *Vincent*, 454 U.S. 263, 274-75 (1981). That some citizens may, in turn, use neutrally provided state assistance to pursue religious education or religious goals of their own choosing does not affect the constitutional validity of the program as a whole. Under *Mueller*, the validity of an aid program is reinforced by the fact that whatever dollars may flow to religious institutions do so only indirectly and through the voluntary private choices of individuals. Individual choices, which in the aggregate es-

tablish a program's validity, cannot at the same time violate the Establishment Clause when taken one at a time. Yet this is precisely the methodology employed by the Washington Supreme Court in the instant case. This type of approach, however, was expressly disapproved in *Lynch*, where this Court recognized that to "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." 104 S. Ct. at 1362.[3]

The Establishment Clause is a limitation on state rather than private action and, therefore, does not bar the provision of neutral benefits to private individuals, even when they may use them toward religious ends. If religion is somehow "advantaged" as a biproduct of neutral treatment, such advantage flows not from government edict but from a neutral policy "that lets each [group] flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952).

To characterize neutral aid to blind students as government "subsidization" of religious enterprises, activities, or education begs the question in chief: Whether *allowing individuals* to use otherwise available education benefits to pursue education toward a religious vocation on the same terms as any other vocation constitutes favoritism *by government* of religion, or active financial "sponsorship" of religion by government in any constitu-

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[3] The court below seriously misread this Court's statement in *Hunt* v. *McNair*, 413 U.S. 734, 742 (1973), that to ide[illegible] a program's primary effect "we narrow our focus from the s[illegible]ute as a whole to the only transaction presently before us." The Washington court misunderstood this directive as suggesting that the "effects" inquiry be narrowed from a program to an individual, rather than from the statute facially to specific programs implementing a statute. *Hunt* refers only to the latter. The proper inquiry is thus not Washington's statutory authorization for vocational rehabilitation but the vocational rehabilitation program as it operates in general rather than in each specific case.

tionally meaningful sense. Unquestionably, government dollars eventually flow to a religious institution. But such a result is unconstitutional only if an absolute separation is to be promoted at the expense of equal treatment of persons with religious motivations or career ambitions.

2. *Original understanding of framers.* The Establishment Clause is a safeguard against governmentally compelled or induced exercise of religion by means direct or indirect, one of which might in practice prove to be financial *in form.* But the clause itself is not concerned primarily with money but with *equal liberty.*

Suggestions to the contrary may be predicated on a misreading of history, especially of James Madison's celebrated *Memorial and Remonstrance Against Religious Assessments* (*see Everson* v. *Board of Education*, 330 U.S. 1, 63-72 (1947) (Appendix to Dissent of Rutledge, J.). While the *Remonstrance* has been cited for the proposition that tax dollars may never be used in any manner which benefit religion, *see, e.g., Flast* v. *Cohen*, 392 U.S. 83, 103-105 (1968); *Everson*, 330 U.S. at 33-37 (Rutledge, J., dissenting), a close examination of the context in which the familiar "three pence" remark occurs reveals its true role in Madison's argument. Madison's first two paragraphs concern the nature of the right of religious freedom and the absence of government jurisdiction to intrude upon it. In his third paragraph, Madison employs a slippery-slope illustration to support his attack on proposed compulsory tithes to finance training in an official religious orthodoxy (albeit one considered "benign" and liberal by many of his contemporaries) as an eventual threat to religious liberty:

> Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property

> for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

330 U.S. at 65-66.

Being asked to pay "three pence" to support religious education was not itself the feared result, but compelled conformity in matters of religious exercise. Focus on the "three pence" phrase as a shorthand quip misrepresents Madison's central animating thesis of *equality* in the exercise of religious liberty, summarized in the very next paragraph:

> Above all are men to be considered as retaining an '*equal* title to the free exercise of Religion according to the dictates of conscience,' . . . . A just government . . . will be best supported by protecting each citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.

330 U.S. at 66 (quoting Article I of Virginia Declaration of Rights, emphasis of Madison).

Nothing like the modern welfare state was remotely envisioned by Madison, a consideration which should not be lightly disregarded. Eighteenth century Virginians knew no broad-based government aid programs funded through tax revenues and administered by large bureaucracies as quasi-entitlements. *See Sherbert*, 374 U.S. at 404-5, n.6. Madison's *Remonstrance* was directed against a practice radically different in its context than the one at issue today. Given his powerful arguments for equality of religious liberty, it is hard to maintain that Madison's *Remonstrance* supports the position that religion alone should be excluded systematically from the broad-based financial benefits of the welfare state. Quite the contrary, to paraphrase Madison's words on another occasion, such unique exclusions would seem to punish

religious individuals with the privation of civil rights. *See McDaniel*, 435 U.S. at 626.

Several years later when he first proposed the draft federal Religion Clauses, Madison responded to fears that the Establishment Clause might be interpreted in a way that would be "extremely hurtful to the cause of religion." 1 *Annals of Congress* 758 (Aug. 15, 1789) (J. Gales ed. 1834) (remarks of Rep. Huntington); *see also id.* at 757 (remarks of Rep. Sylvester). He confirmed that "the object [the Establishment Clause] was intended to prevent" was that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform". *Id.* at 758-59; *see also id.* at 758. The result reached below, reading the clause to require special disfavoring of religion, thus appears *directly contrary* to the original understanding of the framers.

3. *Proper application of the tripartite test.* A fair application of the tripartite test demonstrates that the religious discrimination which the court below thought mandated by the Establishment Clause is in fact prohibited by that clause. The Washington program's obvious secular purpose and primary effect are to provide blind persons with benefits to pursue vocational rehabilitation or professional training of their own choosing, consistent with their natural abilities and physical limitations. By contrast, denial of benefits to petitioner because of his choice of a religious vocation has the primary effect of inhibiting the exercise of an important religious freedom. *See McDaniel, supra.* Such denial is an invidious religious classification, literally singling out the professional ministry for disparate and adverse treatment. *Id.*

The program attains its goal through the means least entangling with religious institutions; money flows to educational organizations only through the private, voluntary choices of individuals. This Court has found a

constitutional allowance of aid to individuals who may choose to use funds at religious institutions, rather than potentially more entangling programs of direct aid to religious institutions. *Compare, e.g., Mueller*, 463 U.S. 388; *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Everson* v. *Board of Education*, 330 U.S. 1 (1947), *with Lemon*, 403 U.S. 612; *Meek* v. *Pittenger*, 421 U.S. 349 (1975). *But see, Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973).

Indeed, if affirmed by this Court, the decision below would hopelessly entangle government in the operations of religious organizations and the expenditures of religious individuals, requiring continuous monitoring and supervision of the religious choices of private parties to make sure that government benefits did not ultimately further their private, religious ends. If the decision of the court below were affirmed, the use by a student of Guaranteed Student Loans or Veterans Benefits to attend divinity school rather than law school, or to pursue an undergraduate major in religious studies rather than political science, may also be unconstitutional. To permit such challenges would force government into the business of monitoring the religious behavior, intentions, and spending patterns of beneficiaries of its programs, to make certain that government funds are not used, however indirectly, to further the religious element, rather than only "secular" elements, in an individual's life. One bristles at the prospect of a standard government form requiring, as a condition for receipt of federal student aid, a promise from the student attending a church-supported college that he not be influenced by such an educational environment to consider entering the ministry or becoming a missionary. A more intrusive and pernicious "entanglement" is difficult to imagine.

Thus, the Establishment Clause as well as the Free Exercise of Religion Clause prohibits the discriminatory treatment of religious persons. This Court should repudi-

ate the fundamentally flawed understanding of the Establishment Clause contained in the erroneous decision of the Washington Supreme Court.

II. The First Amendment's prohibition on governmental discrimination against religious persons supercedes state constitutional provisions which may be interpreted to require such discrimination.

No independent state ground adequate to support the judgment below exists and, therefore, remand for a determination of the precise scope of the state constitutional provision is not needed. Assuming *arguendo* that Article I, § 11 of Washington's constitution would otherwise prevent the use of vocational rehabilitation funds by Mr. Witters for a theological education, such a finding would nonetheless be forced to yield to the First Amendment's prohibition of religion-based discrimination. U.S. Const. art. VI, § 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."); *see Widmar* v. *Vincent*, 454 U.S. 263, 275-76 (1981) (state interest in achieving greater separation than ensured by federal Establishment Clause limited by federal Free Exercise Clause); *McDaniel*, 435 U.S. at 621 (same) (state constitutional provision struck down).[4]

The Washington Supreme Court squarely denied petitioner's free exercise claim: "We hold that the Commission's refusal to provide financial assistance did not violate the Free Exercise Clause of the federal constitution." 102 Wash. 2d at 631, 689 P.2d at 57. The court's holding on the free exercise claim was in no way conditioned upon its view that the Establishment Clause required Mr. Witter's exclusion from the program. Were this Court to reverse only the holding that the Establishment Clause does not require such an exclusion, the Washington Commission for the Blind's policy forbidding assistance to an individual pursuing a career or degree in theology or related areas would be left standing. If petitioner is to obtain any relief, reversal of the denial by the court below of petitioner's free exercise claim is essential. Otherwise, the Commission will be deprived only of a shield it does not need, if petitioner has no affirmative constitutional claim with which to contest its action and its policy. Petitioner should not be forced to petition this Court anew on a free exercise issue already contained in the present petition and in the case as it comes before this Court.

[4] This Court need not address the issue of whether the fact that the vocational rehabilitation program is predominantly funded by the federal government (80 percent) vitiates the adequacy of any asserted state ground to deprive petitioner of all benefits under the program.

CONCLUSION

Accordingly, *amici curiae* urge this Court to reverse the judgment of the court below.

Respectfully submitted,

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